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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RAYMOND J. SMITH,

Plaintiff,

vs.

HUNT & HENRIQUES,

Defendant.

CASE NO.: 5:12-cv-04150-HRL

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT BY DEFENDANT HUNT & HENRIQUES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: November 5, 2013
Time: 10:00 a.m.
Crtrm: 2 - 5th Floor

The Honorable Howard R. Lloyd

TO THE COURT, PLAINTIFF AND HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on November 5, 2013 at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 2, on the 5th Floor of this Court, located at 280 South 1st Street, San Jose, California, 95113, the Honorable Howard R. Lloyd presiding, defendant Hunt & Henriques ("H&H") will and hereby does move this Court for an Order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of H&H on all claims.

This motion is made on the grounds that there is no competent, admissible evidence showing that H&H engaged in any conduct in violation of the California Rosenthal Fair Debt Collection Practices Act, Civil Code § 1788 *et. seq*. (the "Rosenthal Act"), the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et. seq*. (the "FDCPA"), or that H&H committed any negligence through alleged violations of the Rosenthal Act or the Consumer Legal Remedies Act, Civ. Code § 1750, *et seq*. ("CLRA"), and thus there is no genuine issue of material fact for trial.

This motion will be based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Arvin C. Lugay and Michael S. Hunt in Support of the Motion, the records on file in this action, and all other evidence or argument the Court may permit at the hearing in this matter.

DATED: September 6, 2013

SIMMONDS & NARITA LLP
TOMIO B. NARITA
ARVIN C. LUGAY

By: s/Arvin C. Lugay
Arvin C. Lugay
Attorneys for Defendant
Hunt & Henriques

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I. INTRODUCTION

Defendant Hunt & Henriques ("H&H") is a law firm that was retained by Merrick Bank Corporation ("Merrick") to recover an unpaid account owed by plaintiff Raymond J. Smith ("Smith"). The firm sent a pre-suit demand letter to Smith informing him that H&H was attempting to collect the account for Merrick. It also explained his right to dispute and seek validation, consistent with the requirements of section 1692g of the Fair Debt Collections Practices Act, 15 U.S.C. § 1692, *et seq.* (the "FDCPA").

Smith sent a letter to H&H requesting validation of the Merrick account. Although not obligated to do so (because Smith's request for validation came more than thirty days after his receipt of H&H's letter), H&H wrote back, providing Smith with an account statement sent to Smith by Merrick that lists the charge off balance on the account. Despite this, Smith continued to falsely claim that H&H had not properly validated the debt. Smith then filed this action.

After this case was filed, H&H sent a letter to Smith that included proposed language for the joint case management statement in this action. Smith subsequently filed his First Amended Complaint (the "FAC"), alleging that the contents of that letter somehow violated the FDCPA and the California Rosenthal Fair Debt Collection Practices Act, Civil Code § 1788 *et. seq*., (the "Rosenthal Act"). The FAC also claims that H&H violated the FDCPA and Rosenthal Act by failing to send Smith a written notice pursuant to section 1692g(a) of the FDCPA and failing to validate his debt consistent with the requirements of section 1692g(b). In addition, Smith claims that H&H's alleged violations of the Rosenthal Act and the Consumer Legal Remedies Act, Civ. Code § 1750, *et seq*. (the "CLRA") also support a cause of action for negligence.

None of Smith's claims have any merit. The FDCPA and Rosenthal Act claims fail as a matter of law, because Smith admits in his discovery responses that he can neither state facts nor produce evidence establishing that the Account is a

"debt" or "consumer debt" incurred for personal, family, or household purposes.

The FDCPA and the Rosenthal Act also fail because the evidence and the allegations of the FAC establish that: (1) H&H's initial demand letter to Smith provided him with the written notice required under section 1692g(a) of the FDCPA; (2) Smith's written dispute and request for validation was untimely under section 1692g(a) and thus failed to trigger H&H's duties under section 1692g(b); (3) H&H provided more than sufficient validation of the Account in its written response to Smith's dispute (although it was not required to do so under section 1692g(b)); and (4) Smith has failed to establish which statements, if any, were false or misleading under the FDCPA or Rosenthal Act.

Smith's cause of action for negligence fails for two independent reasons. First, the claim fails because there are no facts showing that H&H violated either the Rosenthal Act or the CLRA. Second, the claim is barred by the California litigation privilege because it is based upon pre-litigation and litigation communications. Summary judgment on all claims in the FAC is proper.

II. FACTS & ALLEGATIONS OF THE AMENDED COMPLAINT

A. Statement Of Facts

H&H is a collection law firm that collects outstanding financial obligations referred to it by its clients. *See* Declaration of Michael S. Hunt in Support of Motion for Summary Judgment ("Hunt Decl.") at ¶ 2. H&H regularly files collection law suits against debtors who fail or refuse to pay the financial obligations the firm has been retained to collect. *Id*. In advance of filing any collection lawsuit, however, H&H sends at least one pre-suit demand letter to the debtor in an effort to resolve the claims without litigation. *Id*.

On or about October 12, 2011, Smith's unpaid Merrick account ending with account number 4518 (the "Account") was placed with H&H for collection by Merrick. Hunt Decl. at ¶ 4. On October 20, 2011, H&H sent a pre-suit initial demand letter regarding the Account to Smith, addressed to him at P.O. Box 2381,

Los Gatos, CA 95031-2381. *Id*. at ¶ 6, Ex. B. The letter informed him that Merrick had engaged the firm to collect the outstanding balance, and it included the notice required by section 1692g of the FDCPA. *Id*.

On December 2, 2011, H&H received a letter from Smith dated November 30, 2011, requesting validation of the Account, and threatening legal action against the firm. *Id*. at ¶ 7, Ex. C. The letter states it was "mailed/postmarked" on December 1, 2011. *Id*. H&H then ceased collection communications with Smith regarding the Account until it sent a written validation of the Account. *Id*. at ¶ 8.

On or about February 7, 2012, in response to Smith's letter, H&H sent a validation letter regarding the Account to Smith, addressed to him at P.O. Box 2381, Los Gatos, CA 95031-2381. *Id*. at ¶ 9, Ex. D. This letter identified the original creditor as Merrick Bank, listed the last four digits of the Account number, and enclosed a copy of the August 15, 2008 charge off statement. *Id*. The statement reflects that the principal balance was $1,489.30, the finance charges amounted to $673.34, for a total charge off balance of $2,162.64. *Id*. The balance in the charge off statement is identical to the outstanding balance sought in the initial demand letter sent by H&H on October 20, 2011. *Id*. at ¶¶ 6 & 9, Exs. B & D.

On or about March 28, 2012, H&H received a facsimile letter from Smith dated March 27, 2012. *Id*. at ¶ 11, Ex. E. Smith stated that he "refused and rejected" the validation provided by the firm. *Id*. He requested further validation of the Account, and again threatened legal action against H&H. *Id*.

On August 7, 2012, Smith filed the Complaint in this action. *See* Docket 1. On October 8, 2012, H&H sent a letter to Smith to discuss the preparation of the parties' joint case management statement that was due on October 16, 2012. *Id*. at ¶ 12, Ex. F. In the letter, H&H proposed the following language setting forth the firm's position for inclusion in the joint case management statement:

> We dispute that your request for validation triggered a duty to validate; we dispute that there is a 30-day deadline to validate; we dispute that a debtor has a right to make any specific inquiries or request any particular documents when requesting validation; we dispute that a debt collector is required to provide any documentation when validating a debt; and we dispute that a debt collector does not have a permissible purpose to obtain a credit report.

Id.

On August 8, 2013, H&H served Smith with its first set of Interrogatories ("ROGs"), Requests for Production of Documents ("RFPDs"), and Requests for Admission ("RFAs"). *See* Declaration of Arvin C. Lugay in Support of Motion for Summary Judgment ("Lugay Decl.") at ¶ 2, Exs. A-C. On August 22, 2013, Smith served his responses to H&H's written discovery requests. *Id*. at ¶ 3, Exs. D-F. Smith admits that he cannot state any facts or provide any documentary evidence establishing that he is not responsible for the balance on the Account or that H&H violated the FDCPA or Rosenthal Act. *See* Lugay Decl., Exs. A and D at ROG No. 1; Exs. C and F at RFPDs Nos. 9 and 10. Smith denies that he has "actual knowledge regarding the purpose of the purchases and transactions that comprise the balance incurred on the [Account]." *Id*., Exs. B and E at RFA No. 6. He could not state any facts in support of his allegations that the unpaid balance on the Account is a "debt"as that term is defined by 15 U.S.C. § 1692a(5) and a "consumer debt" as that term is defined by Cal. Civ. Code § 1788.2(f). *Id*., Exs. A and D at ROG No. 3. Smith also admits that he has no documents "reflecting the nature of the transactions that comprise the unpaid balance on the [Account]" or supporting his allegation that the Account is a "debt" as that term is defined by 15 U.S.C. § 1692a(5) and a "consumer debt" as that term is defined by Cal. Civ. Code § 1788.2(f). *Id*., Exs. A and D at ROG No. 3; Exs. C and F at RFPDs Nos. 6 and 8.

B. Allegations Of The First Amended Complaint

On July 9, 2013, Smith filed his First Amended Complaint (the "FAC"). *See* Docket 34. The FAC alleges that H&H violated the FDCPA and the

Rosenthal Act and committed negligence by failing to comply with the Rosenthal Act and the Consumer Legal Remedies Act, Civ. Code § 1750, *et seq*. ("CLRA").

The FAC alleges that in October 2011, H&H sent him "a letter notifying [Smith] that [H&H] is a debt collector, attempting to collect on a debt allegedly owed to Merrick Bank." *See* FAC at ¶ 10.[1]

Smith alleges that "on or around November 30, 2011," he sent a letter requesting validation of the Account. *Id*. at ¶ 12. Significantly, Smith does not allege, nor could he, that he notified H&H of his dispute in writing within thirty (30) days of his receipt of the October 20, 2011 from H&H, as required by section 1692g(b) of the FDCPA. *Id*. at ¶ 11-12; Hunt Decl. at ¶ 6, Ex B.

Smith also claims that H&H "failed to validate the debt within thirty (30) days as required by 15 U.S.C. § 1692(g) [*sic*]," despite the fact that section 1692g does not require a collector to provide validation within thirty days. *See id*. at ¶¶ 12 and13; 15 U.S.C. § 1692g. Section 1692g only requires that a collector cease collection of a debt that is timely disputed under section 1692g(a) until it provides the consumer with verification of the debt. *See* 15 U.S.C. § 1692g(b).

Smith alleges that "on or about January 2011," he had a telephone conversation with an attorney from H&H who informed him that his request for validation "would not hold up in court, causing [Smith] to believe that H&H intended to pursue legal action." *Id*. at ¶ 14. Smith claims that the attorney told Smith he "would be responsible for charges in addition to the amount allegedly owed." *Id*.

Smith admits that on February 7, 2012, H&H sent him a letter attaching the charge off statement for the Account. *Id*. at ¶ 15. He claims the letter did not meet

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[1] The FAC also includes a conflicting allegation, *i.e*., that the October 2011 letter is "unclear" as to whether H&H was the current creditor for the Account, if it was a third party debt collector for the Account, or if it represented Merrick as its client. *Id*. at ¶ 11.

the requirements for validation of a debt under section 1692g. *Id*. ¶¶ 15-16. He also alleges that the February 7, 2012, validation letter was untimely because it was dated 67 days after his November 30, 2011 request for validation. *Id*. at ¶ 16.

The FAC alleges that on October 8, 2012, H&H sent Smith "a response to [his] complaint," that was "in violation of statutory practices . . . for verifying debt," because it contained statements disputing his claims. *Id*. at ¶ 19; Hunt Decl. at ¶ 12, Ex F. The language quoted from the alleged "response" to his complaint is actually a quote from H&H's October 8, 2012 letter regarding the firm's position with respect to the joint case management statement for this case. *Id*.

The FAC's First Cause of Action alleges that H&H violated the California Rosenthal Act, sections 1788.13 and 1788.17 (the section 1788.17 violations are based upon alleged violations of sections 1692e(5), 1692e(10), 1692e(14) and 1692g(a) of the FDCPA). *See* FAC at ¶¶ 21-23. The Second Cause of Action alleges that the facts above also constitute violations of the sections 1692e, 1692f, and 1692g(b) of the FDCPA. *Id*. at ¶¶ 25-26. The Third Cause of Action alleges that H&H committed negligence by failing to comply with the Rosenthal Act and the Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq*. ("CLRA"). *Id*. at ¶¶ 28-32.

III. ARGUMENT

A. Legal Standard Governing Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. Proc. 56(a). As the moving party, Defendant may discharge its burden by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *accord Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting *Celotex*).

To survive this motion for summary judgment, Smith "must present competent evidence that creates a genuine issue of material fact." *See Federal Election Comm'n v. Toledano*, 317 F.3d 939, 950 (9th Cir. 2002). The materiality of a fact is determined by the underlying substantive law. *See State of Calif., on Behalf of Calif. Dept. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 782 (9th Cir. 1998). "Summary judgment is appropriate when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950 (9th Cir. 2009).

B. Smith's Rosenthal Act and FDCPA Claims Fail As A Matter Of Law

Smith's claims under the Rosenthal Act and the FDCPA fail because he admits that he has no evidence to support an essential element of his claims, i.e., that the charges incurred on the Account were incurred primarily for personal, family or household use. Even if there was evidence that the Account is a "debt" or "consumer debt" Smith's Rosenthal Act and FDCPA claims still fail. Smith principal claim is that H&H allegedly failed to comply with section 1692g of the FDCPA.[2] He says H&H did not provide him notice under section 1692g(a)[3] and

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[2] Section 1788.17 of California Civil Code incorporates by reference portions of the FDCPA, including, in this instance, section 1692g of the FDCPA. *See* Cal. Civ. Code § 1788.17.

[3] Section 1692g(a) of the FDCPA states that "[w]ithin five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

that the firm failed to validate the Account in response to his letter, allegedly in violation of section 1692g(b). As explained below, H&H complied with both provisions of section 1692g, so these claims must fail. The remainder of Smith's FDCPA and Rosenthal Act claims are based on alleged violations of sections 1692e and 1692f of the FDCPA, as well as section 1788.13 of the Rosenthal Act. These claims are all based upon conclusory allegations, and cannot be supported by admissible evidence. As a result they fail as a matter of law.

1. The FDCPA and Rosenthal Act Fail Because Smith Admits That He Cannot Establish That The Account Is A Debt Or Consumer Debt

The Rosenthal Act and FDCPA claims fail because Smith has no evidence to support an essential element of his claim; namely, that H&H was seeking to collect a "debt" or "consumer debt" covered by the FDCPA and the Rosenthal Act. Smith admits in his discovery responses that he has no evidence that any part of the alleged outstanding balance for the Account was incurred primarily for personal, family, or household purposes.

An essential element of any claim under the Rosenthal Act or FDCPA is establishing that the financial obligation at issue is a "consumer debt" under the Rosenthal Act or a "debt" under the FDCPA. In order to be considered a "consumer debt" or "debt" under either Act, the financial obligation at issue must be incurred "primarily for personal, family or household purposes." *See* 15 U.S.C. § 1692a(5) and Cal. Civ. Code § 1788.2(e)-(f) .

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(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor."

The existence of a "consumer debt" under the Rosenthal Act or a "debt" under the FDCPA is something that cannot be presumed. Proving the existence of a "debt" is a "threshold" issue in every FDCPA action. *See Turner v. Cook*, 362 F.3d 1219, 1226-27 (9th Cir. 2004) ("Because not all obligations to pay are considered debts under the FDCPA, a threshold issue in a suit brought under the Act is whether or not the dispute involves a 'debt' within the meaning of the statute."). To determine if a "debt" or "consumer debt" was incurred, the relevant focus is on how the debtor used the funds, not on the way that the original lender or subsequent collector treated the debt. *See Bloom v. I.C. System, Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992) (personal loan from a friend used to start software business not a "debt": "The [FDCPA] characterizes debts in terms of end uses . . . [n]either the lender's motives nor the fashion in which the loan is memorialized are dispositive of the inquiry").

The burden of proving the existence of a "consumer debt" lies squarely with Smith. *See Hunter v. Washington Mut. Bank*, 2012 WL 715270, *2 (E.D. Tenn. Mar. 01, 2012) ("It is the [FDCPA] plaintiff's burden to show that the obligation at issue was incurred 'primarily for personal, family, or household purposes.'"). If he cannot produce competent evidence of the nature of the unpaid credit card charges made on the account, then he has not shown that either the Rosenthal Act or the FDCPA applies, and summary judgment should be granted for H&H. *See, e.g., Anderson v. AFNI, Inc.*, 2011 WL 1808779, *14 (E.D. Pa. May 11, 2011) (proof of the existence of a "debt" is an essential element of plaintiff's claim); *Matin v. Fulton, Friedman & Gullace LLP*, 2011 WL 5925019, *4-5 (E.D. Pa. Nov. 14, 2011) (same, following *Anderson*).

Smith has already admitted that he cannot meet his burden, because he has no knowledge regarding the purpose of the purchases and transactions that comprise the unpaid balance on the Account. *See* Lugay Decl., Exs. B and E at RFA No. 6. He also cannot state any facts or produce any documents in support

of his allegations that the Account is a "debt" as that term is defined by 15 U.S.C. § 1692a(5) and a "consumer debt" as that term is defined by Cal. Civ. Code § 1788.2(f). *Id*., Exs. A and D at ROG No. 3; Ex. C and F at RFPDs Nos. 6 and 8.

In short, Smith has absolutely no evidence on the threshold issue of whether the FDCPA or Rosenthal Act apply to the Account. His FDCPA and Rosenthal Act claims thus fail as a matter of law.

2. H&H Complied With Section 1692g Of The FDCPA

Even if the FDCPA applied here, Smith's section 1692g claim fails. The October 20, 2011 letter from H&H to Smith complied with section 1692g(a). As Smith concedes, it identified Merrick as the creditor to whom the Account was owed. *See* FAC at ¶ 10. It also contained the following notice, consistent with the requirement of section 1692g(a) of the FDCPA:

> Federal law gives you 30 days after you receive this letter to dispute the validity of the debt or any part of it. If you do not dispute the validity of the debt, or any part of it, within that period, we will assume that the debt is valid. If you dispute the debt, or any part of it, in writing - by mailing a notice to this firm to that effect on or before the 30th day following the date you receive this letter - we will obtain and mail to you proof (verification) of the debt. And if, within the same period, you request in writing the name and address of the original creditor (if different from our client), we will furnish you with that information too.

See Hunt Decl., Ex. B. The October 20, 2011, letter was not returned to H&H as undeliverable. *Id*. at ¶ 6 & 10.

Section 1692g(a) of the FDCPA requires that the notice be "sent" to the consumer. *See Mahon v. Credit Bureau of Placer Cty, Inc.*, 171 F.3d 1197, 1201 (9th Cir. 1999) (granting summary judgment for collector even though debtors testified they had no memory of receiving the section 1692g notice). Under the common law Mailbox Rule, the Court presumes a debtor receives a letter shortly after it is mailed. *See id.* at 1202. Applying *Mahon* here, the October 20, 2011, letter was mailed to Smith and was not returned to H&H. *See* Hunt Decl. at ¶ 10. Therefore, it was presumed received shortly after it was mailed. *See Mahon*, 171 F.3d at 1202. Smith's allegations refer to information contained in the October 20,

2011 letter, confirming that he received it. *See* FAC at ¶¶ 10-11. H&H complied with section 1692g(a) and all of Smith's FDCPA and Rosenthal Act claims based on an alleged violation of that section of the FDCPA must fail.

Nor did H&H violate 1692g(b) of the FDCPA.[4] Smith claims the firm did not provide him with proper validation in response to his letter. *See* Hunt Decl. at ¶ 9, Ex. D; FAC at ¶ 12. But Smith did not send a timely request for validation, so H&H's duty to provide validation was never triggered. He had thirty days from the day he received the October 20, 2011, letter to request verification. Under the Mailbox Rule, he is presumed to receive the letter shortly after it was mailed by H&H on October 20, 2011. *See Mahon*, 171 F.3d at 1202. He did not request validation until December 1, 2011, however, which is well outside of the statutory deadline. *See* Hunt Decl., ¶ 7, Ex. C. H&H was under no duty to respond to his request and therefore the section 1692g(b) claim fails as a matter of law.

Even if his request for validation had been timely, the section 1692g(b) claim still fails, because H&H properly validated the debt. "At the minimum, 'verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed.'" *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1173-74 (9th Cir. 2006) (quoting *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir.1999)). When H&H provided Smith an account statement sent by his creditor containing his name and the balance due on the account, this was more than sufficient to

[4] Section 1692g(b) of the FDCPA provides: "If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector." 15 U.S.C. § 1692g(b).

validate the debt. *See Gough v. Bernhardt & Strawser, PA*, 2006 WL 1875327, *5 (M.D.N.C. Jun. 30, 2006) (following *Chaudhry*, 174 F.3d at 406).

Smith also claims that H&H somehow violated section 1692g by failing to respond to his request for validation within thirty days. This claim has no merit, as section 1692g does not require that validation must be provided within 30 days. *See* 15 U.S.C. § 1692g. There is no violation of 1692g here, and thus the Rosenthal Act claim fails to the extent it relies upon an alleged 1692g violation.

3. There Is No Evidence To Support A Claim Under Section 1692e or 1692f Of The FDCPA, Nor Is There Evidence Of A Section 1788.13 Violation

Smith has not even pled a valid claim under sections 1692e or 1692f of the FDCPA, or under section 1788.13 of the Civil Code.[5] The FAC does not identify what, if anything, H&H wrote or said to him that was either false or misleading in violation of section 1692e. Nor does the pleading identify any facts indicating that H&H attempted to collect an amount he did not owe, or that it used any "unfair or unconscionable means" to collect the debt, in violation of section 1692f. The claims under section 1788.13 of the Civil Code are also based solely on conclusory allegations.

Smith cannot state a valid cause of action simply by parroting the elements of the statutes. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–679 (2009); *Fed. Election Comm'n v. Toledano*, 317 F.3d 939, 950 (9th Cir. 2002). Smith must allege facts to support the claims, and, in the context of this motion, he must provide admissible evidence to support those facts. *Id*. Conclusory allegations that H&H did not provide

[5] Section 1692e states that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 1692f of the FDCPA states that a collector "may not use unfair or unconscionable means to collect or attempt to collect any debt" and provides a list of conduct that violates the provision. Section 1788.13 of the Rosenthal Act prohibits various false representations in connection with the collection of a debt.

notice or validation of the debt does not support a claim under sections 1692e and 1692f of the FDCPA or section 1788.13 of the Rosenthal Act. *See Katz v. Main Street Acquisition Corp*., 2012 WL 1439132, *3 (S.D. Cal. Apr. 26, 2012) (summary judgment for defendant on section 1692e and 1692f claims; "[m]erely asserting that [the debtor] has not received proof of Defendants' valid ownership of the debt does not establish Defendants ever falsely represented the debt or that their collection[] efforts have been unauthorized.").

Smith has had ample opportunity to produce evidence in support of his claims but has failed to do so. In his discovery responses, Smith admits that he cannot state any facts or provide any documentary evidence establishing that he is not responsible for the balance on the Account or that H&H violated the FDCPA or Rosenthal Act. *See* Lugay Decl., Exs. A and D at ROG No. 1; Exs. C and F at RFPD Nos. 9 and 10. There is no genuine dispute as to any material fact and all of Smith's Rosenthal Act and FDCPA claims must fail as a matter of law.

C. Smith Cannot State A Claim For Negligence

1. Smith's Claim For Negligence Fails Because He Has No Evidence To Support A Violation Of Either The Rosenthal Act Or The CLRA

Smith's negligence claim has no merit. The claim is derivative of the alleged FDCPA and Rosenthal Act claims, which fail for the reasons previously discussed. He also references an alleged violation of the Consumer Legal Remedies Act ("CLRA"), but he has not attempted to state a claim under the CLRA, nor could he support such a claim with admissible evidence.

The CLRA only applies to "unfair methods of competition" or "deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services . . . ." Cal. Civ. Code §1770(a) (emphasis added). Because extensions of credit, like the one at issue in this case, do "not qualify as goods or services under the CLRA," Smith cannot state a cause of action under the CLRA. *See Berry v. American Express Publ'g,*

Inc., 147 Cal. App. 4th 224, 233 (2007) (holding that the American Express credit card issued to plaintiff by defendant did not constitute a "good" or "service" under the CLRA).

The negligence claim fails as a matter of law because Smith has not properly alleged, and cannot support with admissible evidence, any claim under the FDCPA, the Rosenthal Act, or the CLRA.

2. Smith's Negligence Claim Is Also Barred By The Litigation Privilege

Smith's negligence claim is also barred by California Civil Code § 47(b), otherwise known as the California litigation privilege. Smith's cause of action for negligence is derivative of the pre-litigation and litigation communications at issue in the alleged FDCPA and Rosenthal Act claims. Because the litigation privilege applies to derivative tort claims such as negligence, the negligence claim is barred as a matter of law.

The litigation privilege is a well-established bar against state law claims based on communications made in relation to a court proceeding. "For well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from tort liability by the privilege codified as section 47(b)." *Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993).[6] The principal purpose of the privilege is "to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Silberg v. Anderson*, 50 Cal. 3d 205, 213 (1990) (citations omitted). Thus "the absolute litigation privilege of Civil Code section 47, subdivision (b), bars derivative tort actions and 'applies to all torts other than malicious prosecution, including fraud, negligence and negligent misrepresentation. [Citation.]'" *Kuehn*

[6] Section 47(b) of the California Civil Code provides in relevant part as follows: "A privileged publication or broadcast is one made: . . . (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law . . . ." Cal. Civ. Code § 47(b).

v. Kuehn, 85 Cal. App. 4th 824, 834 (2000); *see also Tom Jones Enter., Ltd. v. County of Los Angeles*, 212 Cal. App.4th 1283, 1294 (2013) (affirming demurrer to negligence claim based on communication made in connection with writ of execution). The usual formulation of the elements of the privilege was stated in *Silberg* as follows:

> The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

Silberg, 50 Cal. 3d at 212.

Pre-litigation letters or communicative conduct, in addition to pleadings and communications made during litigation, are also privileged and may not form the basis of any claim. *See, e.g., Silberg*, 50 Cal. 3d at 212 (privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved**.**" (emphasis supplied); *see Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057 (2006) (privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. (citation)"); *Rubin*, 4 Cal. 4th at 1195-96 (privilege covered communications made by attorneys in anticipation of suit, as well as contents of pleading and amended pleadings).

Because the application of the privilege is essential to ensuring the integrity of the judicial process, California courts have given the privilege an expansive reach, using it to bar both statutory and tort causes of action (with the exception of malicious prosecution claims). *See Silberg,* 50 Cal. 3d at 215-16.[7] The

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[7] *See also Jacob B. v. County of Shasta*, 40 Cal. 4th 948 (2007) (constitutional right of privacy claim barred); *Foothill Fed. Credit Union v. Superior Court*, 155 Cal. App. 4th 632, 634-36(2007) (claim for invasion of privacy based on disclosure of personal financial records barred); *Ribas v. Clark*, 38 Cal. 3d 355, 364-65 (1985) (claim for damages arising from alleged violations of Privacy Act, Penal Code §§

compelling policy reasons underling the privilege – allowing for zealous advocacy by attorneys, and free access to the courts by litigants and witnesses – have led the California Supreme Court to observe that no claim – whether statutory, common law, or even **constitutional** – can trump the privilege, regardless of the "label" used by the plaintiff. *See Jacob B.*, 40 Cal. 4th at 962 (constitutional right of privacy claim based on letter sent in connection with litigation was barred: the privilege furthers "the vital public policy of affording free access to the courts and facilitating the crucial functions of the finder of fact.") (citations omitted).[8]

The negligence claim is based entirely upon the same pre-litigation and litigation communications upon which Smith bases his FDCPA and Rosenthal Act claims. Smith alleges no other facts in support of the claim. Smith's cause of action for negligence therefore cannot escape the absolute bar of the litigation privilege and it fails as a matter of law. *See Tom Jones Enter., Ltd.*, 212 Cal. App. 4th at 1294.

IV. CONCLUSION

For each of the foregoing reasons, H&H respectfully requests that the Court enter an Order granting summary judgment for H&H on all causes of action in the FAC.

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630, *et seq*. barred); *Steiner v. Eikerling*, 181 Cal. App. 3d 639, 642-43 (1986) (claim based on publication of forged will prepared for probate barred).

[8] *See also Rusheen*, 37 Cal. 4th at 1064 (privilege encourages attorneys to zealously protect their clients' interests: "It is desirable to create an absolute privilege ... not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions . . .") (citations omitted); *Silberg*, 50 Cal. 3d at 215 (rejecting the "interests of justice" exception to the privilege: "To effectuate its vital purposes, the litigation privilege is held to be absolute in nature.") (citations omitted).

DATED: September 6, 2013

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